



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: American Analytical & Technical Services, Inc.

File: B-282277.3

Date: August 16, 1999

Robert Martinez, Esq., Williams & Jensen, for the protester.
Kenneth R. Pakula, Esq., Environmental Protection Agency, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Procuring agency failed to provide a common basis for competition where it provided the protester with an incorrect version of the solicitation's evaluation scheme while providing other bidders with the correct version.
2. Agency cannot use evaluation scheme in a sealed bid solicitation that requires bidders to submit data packages after bid opening to be evaluated with only the bidders who received scores above the average score of all bidders which submitted data packages.

DECISION

American Analytical & Technical Services, Inc. protests the rejection of its bid under invitation for bids (IFB) No. PR-HQ-98-00031, issued by the United States Environmental Protection Agency (EPA), for laboratory services. American contends that its bid was improperly rejected because the EPA provided it an incorrect version of the evaluation scheme incorporated into the IFB.

We sustain the protest.

The IFB, issued July 22, 1998, was to procure laboratory services to analyze samples from hazardous waste sites to determine the presence and concentration of certain organic analytes in aqueous and non-aqueous samples from multiple contractors under indefinite-quantity contracts. IFB § B.1. The IFB contemplated the award of 19 1-year contracts with two yearly options, with no more than 3 contracts to be awarded to one bidder, and with 9 of the contracts based on a 100-sample monthly

capacity and 10 of the contracts based on a 300-sample monthly capacity. IFB amend. 3, at 2; amend. 5, at 3, 7.

Under the stated terms in the IFB, bidders were required to meet certain qualification requirements. IFB amend. 3, § L.3, at 10-11; IFB, attach. No. 14, Pre-Award Qualification Requirements. Specifically, the EPA provided bidders with pre-award performance evaluation samples to be analyzed within 14 days and the bidders' analyses were to be evaluated by EPA in two sections. Under the IFB's stated evaluation scheme, the bids of the bidders, which did not meet either the section I or II requirements, were to be rejected as nonresponsive. Under section I, the bidders' analyses were evaluated in accordance with a pre-award performance evaluation sample (PA-PES) scoring sheet included in the IFB; a bidder had to receive a minimum score of 75 percent to pass this test. IFB attachs. 14, 16.

Under section II of the pre-award qualification requirements, entitled "Pre-Award Contract Compliance Screening" (CCS), bidders were required to provide a complete PA-PES data package for evaluation to determine to what extent the package was fully compliant and complete with respect to all analytical and reporting requirements of the statement of work. Section II further advised that the bidders' PA-PES data packages would be evaluated against the elements and weighting identified on the PA-PES CCS score sheet. The CCS scoring sheet was contained in attachment No. 18 of the IFB. Only those bidders whose CCS scores were above the statistical average CCS score (average of all bidders' CCS scores) would be determined to have met this qualification requirement. IFB attach. No. 14.

On July 6, prior to issuing the IFB, the EPA published a revised synopsis of the IFB in the Commerce Business Daily (CBD). Agency Report, Part 35. Among other things, the notice advised bidders that the IFB and related documents would be posted on the EPA Internet web site and would be available for downloading. The notice stated that the anticipated release date of the IFB was July 22, and that for those bidders without Internet capabilities hard copies of the IFB and related documents would be provided upon written request. By letter dated July 8, American requested a hard copy of the solicitation. Agency Report, Part 46. The EPA states that it downloaded the IFB from its Internet site and mailed American a copy of the IFB and related documents on several computer floppy disks between July 23 and 24.

Twenty-three sealed bids were received in response to the IFB by December 12. Fourteen of the bids were eliminated from consideration, including American's on February 23, 1999. Protest, exh. 8. EPA rejected American's bid because its CCS score of 4,780 out of 6,000 points was below the average CCS score of 5,208 points.¹

¹In denying the agency-level protest, the agency corrected American's score to 4,800 points.

On March 4 and 8, 1999, American filed an agency-level protest against the elimination of its bid, arguing that the EPA had applied unstated evaluation factors, and deviated from the announced scoring scheme in calculating its CCS score. Agency Report, Part 49. EPA denied the protest on April 16. Agency Report, Part 50. American received this letter on April 23. Protest at 7. Upon receipt of this letter, American states that it became concerned that its IFB contained a different PA-PES CCS scoring sheet than was utilized by the agency in evaluating proposals, and on April 26, discussed this scoring sheet with another bidder, an affiliate of American, and determined that the Internet version of the IFB contained a different scoring sheet in attachment No. 18 than the sheet contained in the IFB provided to American. Protest at 7-8, attach. 3 at 3.

This protest to our Office was filed on May 6 (within 10 days of April 26). American contends that the reason that it failed the IFB's CCS qualification requirement was because the EPA provided it a different version of the PA-PES CCS scoring scheme than was included in attachment No. 18 of the Internet IFB, which was actually used by EPA to evaluate the bidders' data packages. American asserts that the Internet attachment No. 18 contained some specific point deductions for missing/incorrect values and other deficiencies in the data packages, which were not contained in the version of attachment No. 18 that American had been provided. American explains in detail why it lost approximately 950 points that it would not have lost if it had been informed of the actual scoring system. Protest at 3-8, 11.

The agency responds that it provided American with the same version of the final IFB that was on the Internet, that the version American referenced in its protest is a draft version that was on the Internet until July 22, and that American must have obtained the draft version of the IFB from one of American's affiliates that downloaded the IFB from the Internet before it became final on July 22.²

²EPA initially argues that American's protest is untimely either because the protester should have been aware of its basis from the agency's letter denying its agency-level protest and American's protest was filed more than 10 days after receipt of the denial of its agency-level protest, or because the protester had a duty to earlier pursue the information leading to this protest from its affiliates. Agency Request for Summary Dismissal. We disagree. First, our review of the agency letter denying American's protest reveals that the letter did not necessarily reveal that the IFB received by American contained a different CCS scoring scheme than provided other bidders. Moreover, there is no evidence that belies the protester's statement that it first learned of the different CCS scoring formula only after discussing the denial of its protest with its affiliate on April 26. Nor did the protester have any duty to earlier compare the IFB it received with that received by other bidders (even affiliates); it could reasonably presume that the IFB that it was provided by the government, which was nowhere marked as a draft document, was the same IFB set forth on the Internet and provided all bidders.

Although, as discussed below, we find a fundamental flaw in EPA's use of the section II test to reject bidders in a sealed bid procurement, American was competitively disadvantaged because it was provided an incorrect version of the section II evaluation scheme while other bidders received the correct version.

It is a fundamental principle of procurement law that bidders must be treated equally by a procuring activity. An essential element of that treatment involves providing bidders with the same information concerning the agency's requirements so as to provide a common basis for the submission of bids. Marine Research Specialists, B-265869, Jan. 2, 1996, 96-1 CPD ¶ 1 at 3-4; see Federal Acquisition Regulation (FAR) § 14.208(c) (any information that is furnished to a prospective bidder concerning an IFB must be promptly furnished to all other prospective bidders as a solicitation amendment if the information is necessary in submitting a proposal, or if the lack of such information would be prejudicial).

While the contracting officer believes that she properly downloaded the disks sent to American from the Internet after the final IFB was loaded on the Internet and the draft IFB was deleted,³ the record shows that the disks provided to American were either copied prior to the time the contracting officer believed the final IFB was loaded and the draft IFB deleted, or from an outdated version of the IFB that was still in the system.⁴ See Tr. at 52-53, 56. In this regard, it is significant that the agency

³ The draft IFB was on the Internet from July 7 through July 22. Hearing Transcript (Tr.) at 9-10. The index page to the Internet identified this document as a draft document; however, the document itself was not marked as a draft. Tr. at 23, 116-19. The contracting officer testified that she and the EPA Web Master began loading the final IFB on the Internet starting at approximately 2 p.m. on July 22 and this loading took until after 7 p.m. Tr. at 10-14. She also testified that the draft IFB was then deleted from the Internet. Tr. 14-15, 52. She further testified that at approximately 10 a.m. on July 23, the day after the final IFB was posted, she downloaded copies of the final IFB (including attachment No. 18 with the revised CCS evaluation formula) from the EPA's Internet web site to disks, which she mailed to the four potential offerors, including American, who had requested hard copies of the IFB. Tr. at 17-21.

⁴ American has provided the original post-marked envelopes dated July 23 and 24 that contained the disks with the downloaded IFB and attachments that it was furnished by EPA as well as the disks themselves. Protester's Comments Tab 1; Tr. at 94-95. One of these discs contained the draft version of the CCS scoring system that did not include changes made in the final IFB. At the hearing, the contracting officer confirmed that the envelopes and disks were indeed those furnished to the protester, as evidenced by the agency's computer generated and handwritten labels on the envelopes and handwritten notations of the IFB and attachment numbers on the labels of the disks. Tr. at 21-22, 43-44, 54, 75. The directory lists on these disks indicate that the disks were recorded from 11:09 a.m. through 4:52 p.m. on July 22, 1998, not July 23, as testified by the contracting officer. A standard 3.5 floppy disk,
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has confirmed that the envelopes and disks provided by the protester during the course of this protest were those provided by the EPA and does not allege that the disks were tampered with. Thus, in the absence of any other reasonable explanation, we find that EPA provided American the draft attachment No. 18 that did not update the CCS scoring scheme. In this regard, we note that the EPA did not make copies of the disks that it downloaded and sent to American.⁵ Tr. at 91-92; Agency Report at 4 n.4. Nor has it provided copies of the disks that were reportedly downloaded at the same time and sent to other vendors.

Although the agency suggests that the draft IFB may have been obtained by American from one of its affiliates rather than the EPA,⁶ it has proffered no evidence to support this assertion. American denies that the disks containing the IFB on which basis it prepared its bid, was provided by an affiliate. Tr. at 108. In any case, the evidence indicates that these disks with EPA's handwritten notations pasted to them contained the draft IFB. The fact that American's affiliates, which had Internet access, downloaded the draft IFB and used it in preparing their bids, Tr. at 105-06, does not explain the presence of the draft IFB on the disks provided American by EPA. While EPA also alleges that American (or its affiliates) should have known from the Internet index that the IFB it received was only a draft, American did not have Internet access, the IFB itself was not marked as being a draft, and American is not charged with the putative knowledge of other bidders, even if they are affiliates.⁷

Under the circumstances, we conclude that American was treated unequally since it was not provided the same CCS scoring sheet as the other bidders that was the basis for the evaluation of the CCS data package. While EPA asserts that if American had simply complied with the IFB statement of work in preparing its data package it could have passed the CCS test, and notes that other bidders passed the test even though they apparently had the draft attachment No. 18, the record reflects that American's failure to receive from the agency the updated CCS scoring formula that

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as was utilized by the agency to distribute the IFB to American, is pre-programmed to record the last date that the information on the disk was saved or modified, and this date cannot be easily altered. See Tr. at 42, 71-74.

⁵The contracting officer testified that no copies of the draft version of the IFB were retained after the new IFB was loaded on the Internet. Tr. at 92.

⁶American's affiliates did download the draft IFB from the Internet. Tr. at 105-06; Protester's Response to Agency Dismissal Request.

⁷We reject EPA's allegation that American should have known the IFB it received was only a draft because it contained two versions of one of the IFB attachments. We fail to see how this would lead a bidder to conclude that another IFB attachment was only a draft.

more precisely identified how data packages would be evaluated put American at a competitive disadvantage as compared to those bidders who had the proper formula. This is so because the proper CCS scoring formula specifically noted areas in which the bidders' data packages would be evaluated that were not mentioned on the CCS scoring formula that had been provided American and American's data package was primarily downgraded in the areas not mentioned in its scoring formula.

While American was treated unequally, the section II test poses a more fundamental problem and cannot properly be used to reject bids received under sealed bid procedures. As noted, the section II analysis data package was prepared by the bidders on samples they were provided after bid opening, and the bids of bidders, which failed this test by having a score less than the average CCS score considering the scores of all bidders which submitted data packages, were rejected.⁸

Such a test cannot be used to reject bids in the context of a procurement conducted under sealed bid procedures. Under such procedures, an agency

shall award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price related factors included in the solicitation.

41 U.S.C. § 253b(c) (1994). Accordingly, after the evaluation of "price and the other price related factors," the only other appropriate inquiry is that of responsibility.

The section II test is clearly not consistent with 41 U.S.C. § 253b(c), inasmuch as it comparatively evaluates the bidders' responses to determine which bidders will be considered for award. Moreover, the test cannot be considered a matter of bid responsiveness, as identified in the IFB, since responsiveness is determined at the time of bid opening from the face of the bid documents themselves. The Ryan Co., B-275304, Feb. 6, 1997, 97-1 CPD ¶ 62 at 2-3. Nor can a bidder be rejected as nonresponsive where it has the capacity and ability to perform the contract merely because its ability to perform the contract is considered inferior to that of the other bidders. FAR § 9.104.

We recommend that the EPA determine whether the section II evaluation is actually needed and if so recommend that the EPA cancel the solicitation and resolicit using

⁸As noted above, the IFB indicated that the basis for the rejection of bids whose bidders failed this test was nonresponsiveness, although the letter to American only stated that the bid "will no longer be considered for award." Protest, exh. 8.

competitive negotiation procedures.⁹ If the EPA determines that the section II evaluation is not needed, we recommend that the agency determine whether American and the other eight bidders, which were determined acceptable under the section I evaluation, are responsible, and if so include them in the award consideration. American also is entitled to the cost of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving the decision.

The protest is sustained.

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⁹We believe the section I test could be considered a special standard of responsibility judged by objective criteria. FAR § 9.104-2(a).